IN THE SUPREME COURT OF THE [redacted]

OCTOBER TERM, 1940

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
PETITIONER AND APPELLEE BELOW,

vs.

GEORGE ZOLINTAKIS, Executor of the Will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis,
RESPONDENT AND APPELLANT BELOW.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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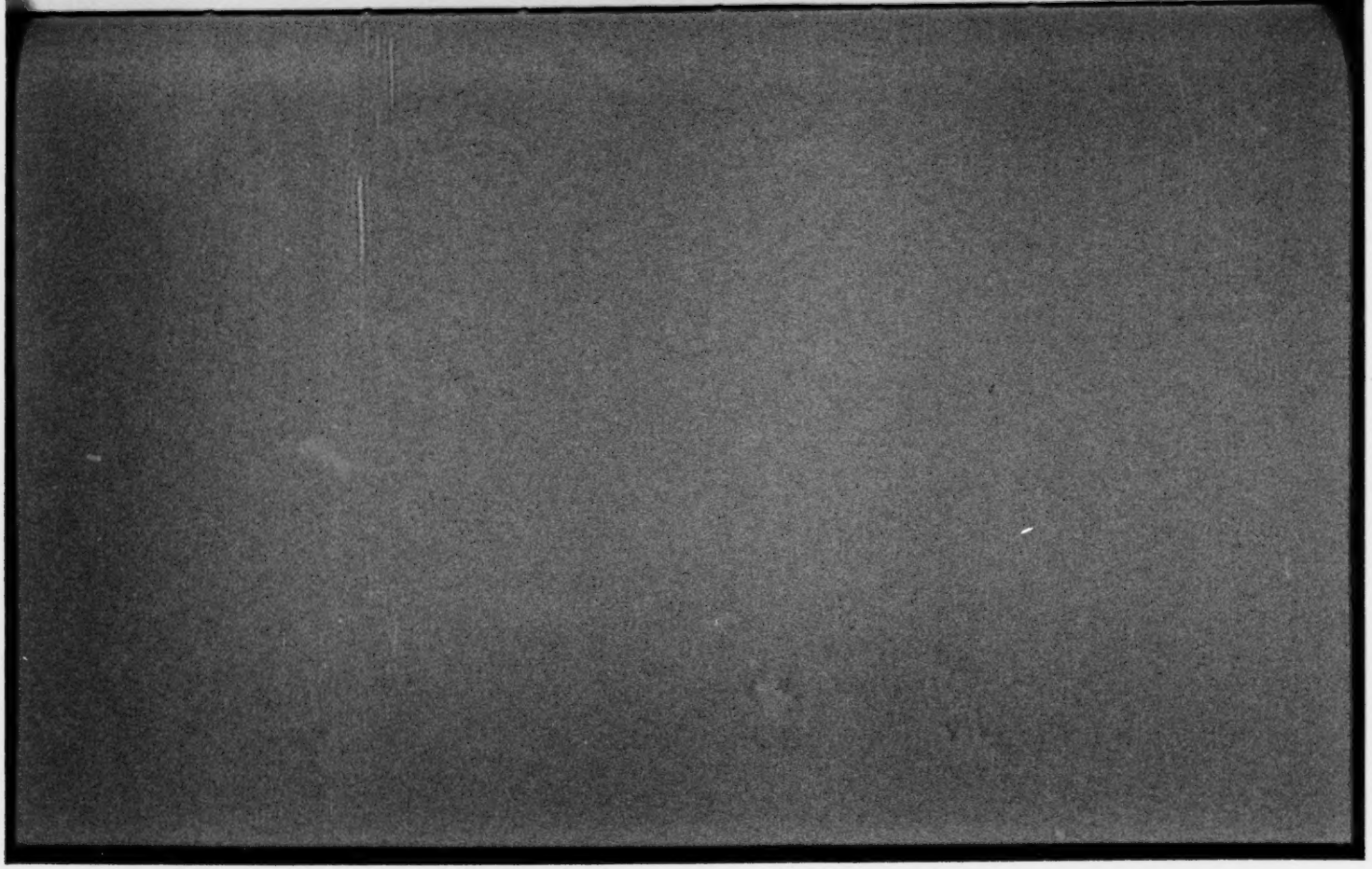

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
Petitioner and Appellee Below,

vs.

GEORGE ZOLINTAKIS, Executor of the Will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis,
Respondent and Appellant Below.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AND BRIEF

The Revised Rules of the Supreme Court adopted February 13, 1939, Rule 38 (5) recites:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

The petition here does not appear to set forth any of the reasons following this statement and as contained in "(b)", the section relating to Circuit Court of Appeals decisions.

It is so obviously outside of the first four of these that they can be passed without quoting, as can also the matters at the top of page 11 of the petition. There is, possibly, a vague attempt to come under the fifth reason which is where the Circuit Court of Appeals:

> "* * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A reference to the four "questions presented" at page eleven of the petition here will clearly show that the above would be the only reason that could be contemplated. These four questions will be hereinafter considered. The petition contains a statement which does not appear to be pertinent to the questions presented but is a discussion of the petitioner's view of his evidence and contentions. It is somewhat one sided, in that it assumes as facts, matters that were in dispute, and omits matters favorable to respondent's case.

The opinion of the Circuit Court sets forth a clear statement of the case, and one which with care presents the position of petitioner on the issues involved, entirely favorable to petitioner. We will not burden the court with a full statement of the case in view of the very clear statement contained in the opinion. We shall attempt to show that there has been no flagrant, or any, departure from the "accepted and usual course of judicial proceedings", and that petitioner's contentions were given careful consideration by the Circuit Court of Appeals.

QUESTIONS THREE AND FOUR

In considering the four questions presented (Pet. 11), we will consider them in the order in which they were decided in the opinion of the Circuit Court of Appeals, and therefore in the reverse order presented by petitioner.

In questions Nos. 3 and 4, the petitioner contends that the judgment on the second appeal was in effect a "consent judgment" as between the parties here, and that this issue was decided by the Circuit Court of Appeals in the second appeal of this case, or that it should have been then presented and adjudicated. This question is disposed of in the first portion of the opinion of the Circuit Court.

What is termed the second trial and second appeal were second trials and appeals as against the insurance company on the insurance policy. The contract of the insurance company was to pay to the beneficiary, and the suit was therefore brought by the beneficiary against the insurance company. The intervenor had no case against the insurance company and attempted to make none. (R. 27) As recited in the opinion herein sought to be reviewed, the petitioner, as intervenor,

> "asked the court to declare the appellant trustee for the use and benefit of the estate of said insured of any amount recovered by the appellant from the insurance company in excess of the debt of insured to beneficiary appellant."

On the second trial, as well as the first trial, the district court decided in favor of the insurance company. After the second decision the petitioner, as intervenor, joined with the beneficiary as appellants to reverse this judgment in favor of the insurance company.

In the second trial of the main issue against the insurance company, the trial court received evidence on this side issue, between the parties now before the court, as to which should get the policy proceeds, if any, were recovered. The trial court did not decide this side issue, but did decide that there was no valid claim against the insurance company, and therefore no fund to be litigated as between the Respondent, beneficiary, and the Petitioner, as intervenor.

As the opinion of the Circuit Court on the third appeal and, now objected to, recites:

> "The trial court 'reserved' the question and did not decide the issue which now constitutes the subject matter of this suit."

Twice in the petition, the petitioner states that this statement by the Circuit Court is not supported by the record now presented to this court.

We make a point of objection here, that this Court should not be called upon to decide that question without having before it the record on the second appeal. The court of appeals had that record before it when it made the decision on this third appeal; and, having also considered that record, on the second appeal, knew exactly what was involved. On

this third appeal both sides quoted from that record in their briefs. That record is not before this Court.

In addition, it does appear by the record here that the trial court twice indicated to petitioner's counsel that the issue here involved had been reserved by the trial court on the second trial. (R. 68)

It is clear that the trial court did not decide this issue on the second trial. The record here clearly indicates that on the second appeal, this petitioner represented to the Circuit Court of Appeals that this issue had not been decided, and that no issue as between the parties here was presented on the second appeal. In the statement of points relied upon on the second appeal, intervenor joined and said to the Circuit Court:

> "This appeal involves no matter as between appellants. Such matters were not decided by the Court. Intervenor relied upon the record as made by plaintiff and the judgment of the Court dismissing the complaints of both is hereby appealed from by both and this designation of points relied upon is made and relied upon by both said appellants." (R. 135)

On the second trial neither the main issue against the Insurance Company nor this side issue, were submitted to the jury for verdict. The Court simply submitted certain interrogatories to the jury. Most of these were on the issue as against the insurance company. A few related to this side issue. In the brief by both parties here to the Circuit Court of Appeals on second appeal against the insurance company, it was stated:

> "The interests of the intervenor and the plaintiff in this proceeding are identical. No issue as between them is involved. The complaints of both were dismissed." (R. 17)

And also:

> "With this background, we now quote the interrogatories and answers not hereinbefore quoted. (Interrogatories 12 to 16 inclusive, are omitted entirely because they pertain to an issue between appellants only, and which is not here presented)." (R. 17)

Petitioner's contention as to "consent judgment" (Pet. 16) seems to make vague reference to the answers of the jury to interrogatories 12 to 16 and also appears to intimate that the mandate from the Circuit Court on second appeal required an entry of judgment for it. It is difficult indeed to see any basis for the contention that respondent beneficiary ever consented to judgment in favor of petitioner.

The pleadings and contentions throughout on this issue were consistently against any such position.

As stated above, the jury entered no verdict for or against either party on this issue. The trial court said to the jury:

> "This case, gentlemen, will not be submitted to you to find a general verdict for or against the Insurance Company. It is being submitted to you upon what is called special interrogatories, and you will be required, under all of the evidence in the case and the instructions now given to you, to record your answer to each one of these interrogatories.
>
> "There are certain questions in this list propounded to you relating to the claim of the intervenor." (R. 59)

The trial court stated on the third hearing, which was on this side issue, that the case had not been submitted to the jury nor had the jury been asked as to the main issue involved. (R. 65)

Under Rule 49 "Rules of Civil Procedure", the answers of the jury to these interrogatories on this issue did not constitute a verdict or a decision of the matter. The court was still required to make Findings. And under Rule 58, the court is then required to: "Deliver the appropriate judgment to be entered."

The court on the second trial made no Findings on this issue and directed no judgment.

Under Rule 54 when more than one claim for relief is presented in an action, the court, at any stage, may make separate determinations of the separate issues presented.

Findings and Judgment were made and entered by the court on the third hearing and appealed from. This, for the first time, presented any phase of this issue to the Circuit Court. In the Circuit Court on the third appeal and now, by petition, it is contended that when the Circuit Court reversed

on second appeal and directed judgment to be entered against the insurance company, that the trial court was required to enter judgment in favor of petitioner, as intervenor, for the full amount of the fund, even though that issue had then never been decided by the trial court, never appealed and never presented to or considered by the Circuit Court. Appellant refers to the language of the mandate, (R. 13) that judgment be entered in favor of both appellants. This clearly did not preclude judgment as their interests entitled them. The important point was the reversal as against the defendant insurance company. This was what both the parties here had asked, and this only. The mandate also directed that:

> "Such further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had." (R. 14)

The trial court then stated that he was proceeding pursuant to this language of the mandate. (R. 69) Petitioner also overlooks the fact that in concluding its opinion and judgment reversing the case as against the insurance company on second appeal, the Circuit Court said:

> "The answers to the special interrogatories required that judgment be entered for *plaintiff*. The judgment of the trial court is reversed and the complaint is remanded, with direction to enter judgment for plaintiffs." (108 F. (2d) 902 at 906).

Respondent here was the plaintiff there, and if there was then any indication from the Circuit Court that judgment should go for either party here, to the exclusion of the other, it was that judgment should be entered for plaintiffs and not for the intervenor. Of course we could not in good faith so contend because we too had told the Circuit Court that this issue had never been decided and was not before that Court on the second appeal.

The rule as we understand it is that an appeal from a judgment of the trial Court presents for adjudication by the appellate Court only the questions involved in the judgment appealed from.

> *Chase v. United States*, 261 F. 833 (8 C. C. A.) citing *Mutual Life Insurance Company v. Hill*, 193 U. S. 533, 48 L. Ed. 788;

United States v. River Rouge Imp. Co.,
296 U. S. 411, 70 L. Ed. 339.

Further, that an appeal will lie only from the final judgment of the trial Court on the issues decided, and will not lie, nor will an appellate Court consider issues not decided by the trial Court.

C. T. C. Inv. Co. v. United States,
108 F. (2d) 383;

Kemp v. National Bank of the Republic,
109 F. 48 (C. C. A. 4);

Certain-Teed Products Corporation v. Wallinger, 89 F. (2d) 427 (C. C. A. 4).

We find no difficulty with the cases cited by petitioner (pp. 16, 19) to the effect that the decision on former appeal of the matters raised is usually binding and becomes the law of the case, or that we are bound by questions which were determined on the former appeal, or that we were then bound to raise any questions decided by the trial Court, and which were involved in the judgment in favor of the insurance company, then appealed from. We simply cannot see that these cases have any application here.

It does not appear as to petitioner's questions 3 and 4 that the Circuit Court departed in any degree, "from the accepted and usual course of judicial proceedings."

SECOND QUESTION PRESENTED.

The second question presented by petitioner is, "was there sufficient evidence to sustain said Findings of Fact and Judgment?" The discussion of this (p. 13) adverts to the jury Findings as if there were a verdict entered. As a matter of fact, certain questions only were asked, some of which the jury answered favorably to the petitioner and some favorably to the respondent. (R. 59) Some of the answers were clearly not supported by the evidence, but are contrary thereto. There was no evidence whatsoever to the effect that the insured ever promised to pay back to the beneficiary any money advanced by the latter. There was no evidence of any statement that the policy should be returned if the money was paid back or that the money must be paid back.

In any event all that the jury found favorable to petitioner, is their answers to the effect that the advancement of money by the beneficiary to the insured was as a loan.

The opinion of the Circuit Court of Appeals reviews the pertinent testimony and then states that it will assume, for the purposes of its decision, that there was a loan of the money and a debtor and creditor relationship created; so that the Circuit Court instead of setting aside, as claimed, the Finding of the jury, assumed such Findings to be correct and then held at a matter of law that this did not determine the case in favor of the petitioner. The opinion says:

> "We will assume without more, for the purpose of our decision, that a debtor and creditor relationship existed between insured and beneficiary."

The Court then squarely faced the proposition as to whether or not a debtor-creditor relationship between insured and beneficiary was sufficient in and of itself to establish a trust of the proceeds of the insurance policy without more:

> "In our view, the result does not turn on the question of whether or not there was a loan by the appellant beneficiary to the insured, in consideration for which the appellant was made beneficiary, but rather does the existence of the debtor-creditor relationship, created by the loan, limit the otherwise unqualified and vested right of the beneficiary to the proceeds of the policy upon maturity of the contract." (R. 119)

It then holds, upon the authorities cited in the decision, and the other authorities cited by petitioner, and in view of the Utah decisions as to the rights of beneficiary, and the language of this policy agreement, that such findings by the jury or by the Court were not determinative of the issue, but that the beneficiary was nevertheless entitled to recover.

The holding of the Court "that absent a clear, convincing and cogent expression on the part of insured to the contrary, the designated beneficiary in a policy of insurance is entitled to the entire proceeds on maturity of the contract," and "that a debtor-creditor relationship created by a loan of money from the beneficiary to the insured creates no presumption of a limited right of recovery on the party of the designated beneficiary", indicates that the findings

of the jury and the evidence in the record in support thereof were received and reviewed by the Circuit Court of Appeals in a light most favorable to petitioner, and that the findings of the Court were not disregarded, whether supported or unsupported.

There was no departure from "the accepted and usual course of the judicial proceedings." The holding of the Court on the issue as to the existence of a trust above stated, is supported by the overwhelming weight of authority, as is indicated in the opinion itself. Petitioner does not appear to take exception to the law as laid down by the Circuit Court of Appeals on this question. We respectfully suggest that the writ is sought merely to review the evidence or the inferences drawn from it, and therefore should be denied.

> *General Talking Picture Corporation v. Western Electric Company*, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849.

FIRST QUESTION PRESENTED.

The first question presented by petitioner (p. 11) challenges the power of the Circuit Court of Appeals in reversing this case to direct judgment for the respondent without granting a new trial.

The first point discussed under this is the contention that the case was tried to a jury, and therefore petitioner should have been granted a new trial on reversal of the judgment. As herein pointed out the Circuit Court gave full force and effect to the jury's answers and also the findings of the Court that a debtor-creditor relationship existed between the insured and the beneficiary. The statement as to the trial is not accurate for the reason that this issue came up directly on the third trial and while no additional evidence could be adduced, there was of course opportunity to try the matter fully.

It was heard exclusively by the Court, both sides participating and the Court then entered its decision (R. 66) in which it was said:

> "I think that under that state of facts the law would raise the question of trusteeship."

While the trial Court indicated that it accepted the answers of the jury, the Court nevertheless made complete findings, conclusions of law and judgment after the third hearing. These were prepared by petitioner. They did not incorporate any formal approval of the answers by the jury.

The next point discussed by petitioner (R. 12) is that the respondent did not move to vacate any of the answers by the jury within ten days. It is claimed that this was required by subdivision (b) of Rule 50. That rule, however, relates only to a "verdict" by the jury and here there was no verdict. The next contention is that even though there was no motion to vacate by respondent that the Court was without power to direct a judgment, but no authority is cited supporting this contention. The finding of the Court of a trusteeship relationship was pursuant to petitioner's complaint in intervention (R. 5) in which it was specifically alleged that the beneficiary,

> "was and is a trustee for the use and benefit of this intervenor of the proceeds of said policy * * *" (R. 6)

And wherein it was specifically prayed:

> "That the Court declare that the plaintiff, Peter Zolintakis is trustee for the use and benefit of the estate of the said deceased of any amount recovered by said plaintiff from the defendant * * *."

As already pointed out, the case proceeded entirely upon the theory that the claim against the insurance company was one by the beneficiary, and that the side issue as to the right to the fund was an equitable matter to be decided and which was decided by the trial Court, the petitioner fully concurring.

The purpose of petitioner's action being to establish the existence of a trust was purely equitable.

See,

Pomeroy Equity Jurisprudence, Fourth Edition, Volume 1, Section 151, page 184 and Section 155, page 189;

Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183:

National Bank of Commerce v. New York Equitable Trust Company, 227 Fed. 526;

Delaware Bay State Gas Company v. Rogers, 147 Fed. 557;

Hopkins v. Grimshaw, 165 U. S. 342, 41 L. Ed. 739;

Thompson v. Emmett Irrigation District, 227 Fed. 560.

An appeal in equity brings up the whole record, and the appellate Court is authorized to review the evidence and make such order or decree as the Court in the first instance ought to have made, giving proper weight to the findings on disputed issues of fact, which should be accorded to a tribunal which heard the witnesses.

Keller v. Potomac Electric Power Co., 43 S. Ct. 445, 261 U. S. 428, 67 L. Ed. 731;

Metropolitan Holding Co. v. Snyder, 79 Fed. (2d) 263, 103 A. L. R. 912;

Waters v. Disbrow & Co., 70 Fed. (2d) 572;

A. O. Smith Corporation v. Petroleum Iron Works Co. of Ohio, 73 Fed. (2d) 531;

Swift v. Jackson, 37 Fed. (2d) 237, certiorari denied 50 S. Ct. 351, 281 U. S. 745, 74 L. Ed. 1158;

Jonah v. Armstrong, 52 Fed. (2d) 343;

Radio Corporation of America, et al., v. Radio Engineering Laboratories Inc., 293 U. S. 1, 79 L. Ed. 163;

Howbert v. Penrose, (10 C. C. A.) 38 Fed. (2d) 577;

Maryland Casualty Co. v. Beebe, (10 C. C. A.) 54 Fed. (2d) 743;

Stanley v. Stanley, 97 Utah 520, 94 Pac. (2d) 465;

Silver King Consol. Mining Company v. Sutton, 85 Utah 297, 39 Pac. (2d) 682;

Jensen v. Howell, 75 Utah 64, 282 Pac. 1034;

Tripp v. Bagley, et al.,
74 Utah 57, 276 Pac. 912.

All transactions with relation to this policy were between the insured who is dead and the beneficiary who is dead. Neither can give further testimony and no one else was present at the time of the transactions.

One witness, George Cayias, who testified on the first two trials against the insurance company had only to do with the issuance of the policy and testified as to the difficulty the insured had in paying the premiums. This testimony was presented by the insurance company and preserved in this record. (R. 28) It had no bearing upon any issue decided.

No reliance was placed on any rulings of the court as to the admission or exclusion of evidence. There was no suggestion that any new or different evidence could be developed on subsequent trial; it is apparent that it could not be. No contention is made that any additional evidence could be presented.

It is also true as stated in the petition (p. 18) "no evidence was introduced" upon the third trial, when this matter came before the court for final determination. Neither party then had any additional evidence.

Under such circumstances it was the duty of the Circuit Court to determine the issues without remand.

City and County of Denver v. Denver Union Water Company, 38 S. Ct. 278, 246 U. S. 177, 62 L. Ed. 649;

Allen v. St. Louis National Bank, 120 U. S. 20, 30 L. Ed. 573;

Arizona Edison Company v. Southern Sierra Power Company, 17 Fed. (2d) 739, certiorari denied *Southern Sierra Power Company v. Arizona Edison Company,* 47 S. Ct. 768, 274 U. S. 757, 71 L. Ed. 1336;

Weeks v. Pratt, 47 Fed. (2d) 53, certiorari denied *Pratt v. Weeks,* 51 S. Ct. 106, 282 U. S. 892, 75 L. Ed. 756.

In the case of *Alwood v. Lewis,* 254 Fed. 810, 166 C. C. A. 256, it was held that:

> "Where the facts in an equity case were fully developed and the trial Court disregarded the advisory verdict of the jury, and where the litigation had been long drawn out, the appellate Court was warranted in determining the issues of fact."

On the second appeal of this case the Circuit Court reversed the judgment of the trial Court and remanded the cause with direction to enter judgment against the defendant Insurance Company without new trial. 108 Fed. (2d) 902. Certiorari denied, 310 U. S. 640; 60 S. Ct. 1087.

In *Swift v. Jackson*, (10 C. C. A.) 37 Fed. (2d) 237, the Tenth Circuit Court of Appeals held that in an appeal in equity the appellate Court has full power to make and enter its own decree.

CONCLUSION.

It would appear, therefore that there has been no departure "from the accepted and usual course of judicial proceedings," either indulged in or sanctioned by the Circuit Court of Appeals. That there is no special and important reason, or any reason, for the granting of certiorari in this case.

It is respectfully submitted that the petition should be denied.

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